

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SIERRA CLUB, *et al.*

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

CASE NO. C13-0967-JCC

ORDER

This matter comes before the Court on the parties' joint motion requesting dispute resolution and stipulated motion to seal (Dkt. No. 419). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion in Plaintiffs' favor for the reasons explained herein.

I. BACKGROUND

The litigation out of which this dispute arises began in 2013. Plaintiffs, several environmental interest groups, filed suit alleging that Defendant BNSF Railway Company violated the Clean Water Act by polluting various waterways with dust from its open-top coal cars. (Dkt. No. 1.) The parties settled that lawsuit pursuant to a Consent Decree (the "Decree") entered on May 2, 2017. (Dkt. No. 384.) The Decree imposed three primary obligations on Defendant. First, Defendant was required to clean up accumulated coal and petcoke material at several locations along its tracks. (*Id.* at ¶¶ 15–20.) Second, Defendant was required to donate

1 \$1,000,000 to an environmental non-profit organization. (*Id.* at ¶ 21.) Third, Defendant was
2 obligated to conduct a study of the commercial and operational feasibility of covers for its open-
3 top coal cars to reduce the coal dust blown from moving trains. (*Id.* at ¶¶ 8–14.) The dispute
4 before the Court centers on the “Car Cover Study” requirement. (Dkt. Nos. 419–21.)

5 **A. The Car Cover Study Requirement**

6 The Decree required Defendant to “conduct a study to assess the commercial and
7 operational feasibility of car covers for use on open-top coal and petcoke railcars.” (Dkt. No. 384
8 at ¶ 8.) Defendant was obligated to evaluate only those car covers “for which a functioning
9 prototype [was] reasonably available to [Defendant] within six months” of the entry of the
10 Decree. (*Id.*) In the “first phase” of the study, Defendant was required to “conduct outreach and
11 solicit participation from car cover manufacturers.” (*Id.* at ¶ 9.) The Decree did not require
12 Defendant to “develop any car cover design” or assess “conceptual” car cover designs. (*Id.*)
13 Defendant was, however, “exclusively responsible for conducting and overseeing the Car Cover
14 Study, as well as arranging for equipment and personnel.” (*Id.*)

15 Once the Car Cover Study was underway, the Decree required Defendant to provide
16 twice-yearly reports to Plaintiffs regarding the study’s progress. (*Id.* at ¶ 11.) If through the study
17 Defendant determined that a car cover was commercially and operationally “feasible,” the
18 Decree required it to adopt the technology and present it to other members of the railroad
19 industry. (*Id.* at ¶¶ 12, 14.) The Decree defines “feasible” to mean those designs compatible with
20 Defendant’s current coal-transportation operations. (*Id.* at ¶ 13.)

21 **B. Defendant’s Outreach Efforts in the “First Phase” of the Study**

22 After the Decree was entered on May 2, 2017, Defendant “convened an internal working
23 group responsible for the Study, that began planning the Study logistics,” and “began to identify
24 parties” who might be able to provide prototypes. (Dkt. No. 421 at 3.) On September 15, 2017—
25 more than four months after the Decree was entered—Defendant emailed manufacturers
26 requesting proposals. (*Id.*) The request summarized the terms of the Decree and informed

1 recipients that the study “would be limited to functioning prototypes that are available for use . . .
2 no later than November 2, 2017.” (Dkt. No. 423 at 6.)

3 Several manufacturers expressed interest in participating. One of those manufacturers
4 (the “Manufacturer”), had already been in contact with Defendant regarding a prototype car
5 cover before the Decree was entered. (Dkt. No. 420-1 at 29–32.) As early as November 2016, a
6 representative from Manufacturer was in contact with Defendant regarding its prototype car
7 cover. (*Id.* at 31–32.) Around that time, Defendant sent Manufacturer a list of 17 detailed “design
8 considerations” for a car cover design. (*Id.* at 29–30.) In response to Defendant’s September
9 2017 request for proposals, Manufacturer sent Defendant a detailed proposal and schematics of
10 its prototype. (*Id.* at 22.) Manufacturer told Defendant that it was “all ready to start on the coal
11 cover, so we can build the test unit for the car.” (*Id.*) Manufacturer quoted the price for one cover
12 to include “design, construction, and installation cost” and promised that it would work to “have
13 a cover by the end of the year to install for your testing.” (Dkt. No. 423 at 41.) The record
14 indicates that Defendant did not respond to Manufacturer’s official proposal before the
15 November 2, 2017 deadline. (Dkt. Nos. 420-9 at 2, 421 at 4.)

16 In January 2018—more than two months after the Decree’s deadline for procuring a
17 prototype cover—Defendant emailed Manufacturer and several other suppliers re-soliciting
18 proposals. (*See* Dkt. No. 420-1 at 35.) Defendant reiterated that the Decree “only required [it] to
19 assess car cover designs with a functioning prototype that is reasonably available . . . by
20 November 2, 2017,” which had already passed. (*Id.*) “Based on our correspondence and
21 discussions,” Defendant stated, it “underst[ood] that your company d[id] not currently have a
22 functioning prototype” for use in the Car Cover Study. (*Id.*) Notwithstanding that deadline,
23 Defendant inquired whether Manufacturer and the other suppliers would be able to field a
24 prototype at a later date. (*Id.*) A little more than two weeks later, Manufacturer sent Defendant an
25 updated proposal. (*Id.* at 16.) Manufacturer promised delivery and installation by July 2018, and
26 offered Defendant the opportunity to lease a prototype instead of buying one. (*Id.*) Defendant

1 continued a regular dialogue with Manufacturer after that time, but never committed to testing its
2 prototype cover. (*See* Dkt. No. 420 at 4–5.)¹

3 **C. Plaintiffs Invoked the Decree’s Dispute Resolution Provisions**

4 In late April 2018, Defendant informed Plaintiffs that it had not begun the Car Cover
5 Study because a functional prototype was not available by November 2, 2017. (*See* Dkt. No.
6 420-5 at 2–3.) Plaintiffs replied to Defendant in May 2018 and invoked the Decree’s dispute
7 resolution provisions. (Dkt. No. 420-7.) The parties exchanged documents regarding Defendant’s
8 efforts to secure a prototype, but the parties failed to reach a satisfactory resolution. (Dkt. No.
9 420 at 4.) The parties jointly move the Court to resolve the dispute. (Dkt. No. 419.) Plaintiffs
10 request the Court “order [Defendant] to commence the study as soon as practicable.” (Dkt. Nos.
11 419, 420 at 7.) Defendant asks the Court to find it has no further obligation regarding the Car
12 Cover Study. (Dkt. No. 421 at 6.)

13 **II. DISCUSSION**

14 **A. The Court’s Authority to Enforce the Decree**

15 A trial court retains jurisdiction to enforce its consent decree. *Hook v. State of Arizona,*
16 *Dep’t of Corr.*, 972 F.2d 1012, 1014 (9th Cir. 1992). The Decree in this case expressly grants
17 jurisdiction to the Court to issue orders as needed for the Decree’s “implementation or
18 modification,” or for “enforcing compliance with, or resolving disputes regarding” it. (Dkt. No.
19 384 at ¶ 2.) Thus, the Court has jurisdiction to resolve this dispute, to modify the Decree, or to
20 order a party to comply with it.

21 Courts interpret consent decrees as contracts, applying state contract law. *Jeff D. v. Otter,*
22 643 F.3d 278, 284 (9th Cir. 2011); *United States v. Asarco, Inc.*, 430 F.3d 972, 980 (9th Cir.
23 2005). Under Washington law, “[t]here is in every contract an implied duty of good faith and fair

24 ¹ Defendant heard from several other interested suppliers who might have been able to field a
25 prototype. (*See* Dkt. No. 420 at 4–6.) As with Manufacturer, the record indicates that Defendant
26 took no action to secure a prototype from those manufacturers before the November 2, 2017
deadline, and that it re-solicited prototypes after the deadline had passed. (*Id.*)

1 dealing [that] obligates the parties to cooperate with each other so that each may obtain the full
2 benefit of performance.” *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991). The
3 implied duty of good faith “requires ‘faithfulness to an agreed common purpose and consistency
4 with the justified expectations of the other party.’” *Edmonson v. Popchoi*, 256 P.3d 1223, 1227
5 (Wash. 2011) (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)).

6 Because consent decrees are both a contract and a judicial order, courts have the
7 “inherent authority” to modify their terms when enforcement is “no longer equitable.”
8 *Washington v. Moniz*, Case No. 2:09-CV-5085-RMP, 2015 WL 12643792, slip op. at 7 (E.D.
9 Wash. 2015). A modification is appropriate when there is a “significant change either in factual
10 conditions or in the law.” *Asarco*, 430 F.3d at 979 (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*,
11 502 U.S. 367, 384 (1992)). Courts will not ordinarily modify a consent decree where the relevant
12 changed circumstances “actually were anticipated at the time” the decree was entered. *Id.*

13 A party’s failure of “substantial compliance” with the requirements of a consent decree
14 may constitute a change in factual conditions to justify modifying a decree, including extending
15 a decree’s time limits. *See Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transit Auth.*, 564 F.3d
16 1115, 1120–21 (9th Cir. 2009). “Substantial compliance” is met where a deviation from the
17 decree’s terms is “so minor and trivial as not ‘substantially to defeat the object which the parties
18 intend to accomplish.’” *Jeff D.*, 643 F.3d at 284 (quoting *Wells Benz, Inc. v. United States*, 333
19 F.2d 89, 92 (9th Cir. 1964)). If modification is warranted, a court must then determine if the
20 appropriate modification is one “suitably tailored to resolve the problems created by the
21 changed” circumstances. *Labor/Cnty. Strategy Ctr.*, 564 F.3d at 1120–21 (citing *Rufo*, 502 U.S.
22 at 391).

23 **B. Defendant’s Compliance with the Car Cover Study Requirement**

24 The Court finds that Defendant’s initial delay in attempting to procure a functional car
25 cover prototype was a breach of the Car Cover Study requirement. (*See* Dkt. No. 384 at ¶ 9.)
26 Although Defendant states that it “convened an internal working group” and “began to identify”

1 potential suppliers after the Decree was entered on May 2, 2017, it fails to explain its substantial
2 delay in soliciting proposals from those suppliers. (Dkt. No. 421 at 2.) Defendant did not send its
3 request for proposals until four months after the Decree was entered—or 48 days before the
4 Decree’s deadline for it to procure a “reasonably available” prototype. (*See* Dkt. Nos. 420-1 at 2–
5 3, 384.) Defendant’s inaction is even less justified when considering that it had been in contact
6 with Manufacturer long before the Decree was entered. (Dkt. No. 420-1 at 29–32.) Defendant
7 was obligated to solicit manufacturers in the “first phase” of the Car Cover Study, not simply
8 identify them. (Dkt. No. 384 at ¶ 9.) Defendant was aware that Manufacturer was interested in
9 providing a prototype, and only needed to formally request one. Its unaccounted-for delay in
10 soliciting manufacturers reduced the likelihood that Defendant would find a prototype available
11 before the November 2, 2017 deadline—the critical “first phase” of the Car Cover Study. (*Id.*)

12 Defendant’s delay was a failure of substantial compliance with the terms of the Decree
13 because it undermined the purpose of the Car Cover Study requirement, which was to identify
14 prototype covers that might eventually be used on Defendant’s trains. *See Jeff D.*, 643 F.3d at
15 284. Defendant’s delay was also a breach of its implied duty of good faith to complete the Car
16 Cover Study because it reduced the probability that Defendant would procure a functioning
17 prototype by November 2, 2017. *See Edmonson*, 256 P.3d at 1227. Defendant has not offered a
18 sufficient justification for that delay, and the Court finds that Defendant breached its obligations
19 under the Decree.

20 **C. Availability of Car Cover Prototypes**

21 Defendant asserts that “even if [it] had begun outreach immediately upon entry of the
22 Decree, the evidence demonstrates that [it] still would not have found an available prototype” by
23 the deadline. (Dkt. No. 421 at 5.) Defendant essentially argues that even if its delay was
24 unwarranted, it was harmless. The Court disagrees.

25 As early as January 2017, Defendant was in contact with Manufacturer regarding a cover
26 for open-top train cars. (Dkt. No. 420-1 at 29–32.) Near that time, Defendant sent Manufacturer a

1 list of 17 “design considerations” for such a cover. (*Id.*) Then, after Defendant’s mid-September
2 2017 official request for proposals, Manufacturer offered to build and install a functioning
3 prototype by the end of the year. (Dkt. No. 423 at 40–41.) Assuming that Manufacturer could
4 deliver on that promise—which Defendant does not appear to dispute—the record demonstrates
5 that Defendant could have had a functional prototype a little more than three months after
6 soliciting one. Had Defendant made that request when the Decree was entered, or within a
7 reasonable time thereafter, it could have taken delivery before the six-month deadline. In other
8 words, while Manufacturer’s projected delivery date did fall after the Decree’s November 2,
9 2017 deadline, that appears to be the result of Defendant’s delay in soliciting proposals.

10 Defendant also emphasizes that Manufacturer’s October 2017 proposal listed the price
11 for its prototype to include “design, construction, and installation cost.” (Dkt. No. 420-1 at 24.)
12 Defendant claims that Manufacturer’s proposal would have “contravened the [Decree], which
13 expressly provides . . . that it ‘shall not be construed to require [Defendant] to . . . develop any
14 car cover design.’” (Dkt. No. 421 at 4.) But the Decree also provides that, “As between the
15 Parties, [Defendant] is *exclusively* responsible for . . . arranging for equipment and personnel.”
16 (Dkt. No. 384 at ¶ 10) (emphasis added). Given that provision, the Decree makes Defendant
17 responsible for the reasonable costs of procuring a functional prototype for the study. (*Id.*)
18 Nevertheless, Defendant argues that it was not required to accept Manufacturer’s proposal
19 because it would have been required to pay Manufacturer to design a car cover. For two reasons,
20 Defendant’s position is unavailing.

21 First, nothing in the Decree shields Defendant from having to incur some expense to field
22 prototypes to be used in the Car Cover Study. As noted above, the Decree makes any cost
23 incurred in the study Defendant’s to bear. Nor does the Decree shield Defendant from the
24 obligation to fund the design process. The operative language in the Decree provides only that
25 Defendant is not required to “*develop* any car cover design.” (*Id.*) (emphasis added). The Decree
26 says nothing about Defendant’s obligation to pay a supplier to do so.

1 Second, even if the Court interprets the Decree to mean that Defendant would not be
2 obligated to fund the design of a car cover, Manufacturer’s prototype proposal did not ask it to.
3 Although the proposal stated that it covered “design, construction, and installation cost,” it is
4 clear that Manufacturer had already designed the cover. (Dkt. No. 420-1 at 24.) Defendant casts
5 Manufacturer’s proposal as an offer to design a cover out of whole cloth. (*See* Dkt. No. 421 at 4.)
6 But not only did Manufacturer’s proposal describe the prototype’s functionality—implying that
7 it had already been designed—it included detailed schematics. (Dkt. No. 420-1 at 23–26.) Also,
8 consistent with the fact that Defendant and Manufacturer had begun discussing the design of a
9 car cover months earlier, Manufacturer’s initial proposal endeavored to have a cover ready for
10 installation within less than three months. (*Id.*) Far from asking that Defendant pay to design a
11 car cover prototype, the Court finds that Manufacturer’s proposal merely requested that
12 Defendant make a financial commitment to secure a prototype for use in the study—the very
13 obligation Defendant has under the Decree.

14 **D. Modification of the Car Cover Study Requirement**

15 The Court construes Plaintiffs’ requested relief as a petition to modify the terms of the
16 Decree. Plaintiffs’ request that the Court “order [Defendant] to commence the study as soon as
17 reasonably practicable” requires a modification because Defendant was only obligated to do so
18 with prototypes “reasonably available” to it by November 2, 2017. (Dkt. Nos. 420 at 3, 384 at ¶
19 9.) Defendant points out that the Decree requires the parties to “make a good faith effort to reach
20 agreement” before moving the Court for modification. (Dkt. 421 at 5.) Defendant argues that
21 Plaintiffs have failed to comply with that requirement. (*Id.*) The parties did, however, confer at
22 length about Defendant’s obligation regarding the Car Cover Study before moving the Court for
23 dispute resolution. (*Id.* at 2) (“The Parties extended the Decree’s 30-day period for informal
24 dispute resolution. . .”). The Court finds that the informal dispute resolution period satisfies the
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1 requirement that the parties confer before moving the Court to modify the Decree.² (Dkt. No.
2 384 at ¶¶ 40–42.)

3 As noted above, the Court finds that Defendant’s four-month delay in soliciting
4 functional car cover prototypes constitutes a failure of substantial compliance with the Decree’s
5 terms that warrants modifying the Decree. *Asarco*, 430 F.3d at 979; *see also Labor/Cnty.*
6 *Strategy Ctr.*, 564 F.3d at 1120–21. An appropriate modification must be “suitably tailored to
7 resolve the problems created” by that delay—here, that Defendant could not secure a “reasonably
8 available” prototype by the six-month deadline. *Asarco*, 430 F.3d at 979; (Dkt. No. 384 at ¶ 9.)
9 Therefore, the Court finds that an appropriate remedy is a fresh six-month period during which
10 Defendant must actively solicit functional prototype car covers. This modification seems
11 especially appropriate because the record indicates that one or more manufacturers is most likely
12 capable of supplying a prototype within that timeframe.

13 **E. The Parties’ Joint Motion to Seal**

14 The parties also filed a stipulated motion to seal their respective dispute resolution
15 statements as well as attached affidavits and exhibits. (Dkt. No. 419 at 2.) The Court starts from
16 the position that “[t]here is a strong presumption of public access to [its] files.” W.D. Wash.
17 Local Civ. R. 5(g). But where the records sought to be kept under seal accompany a non-
18 dispositive motion, the Court need only find “good cause” to permit sealing. *Kamakana v. City*
19 *and Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). The Court has reviewed the
20 documents the parties move to seal. Many contain information from non-party car cover
21 manufacturers regarding prototype car covers, and include detailed designs, manufacturing
22 methodologies, and pricing information. (*See generally* Dkt Nos. 420–23.) Moreover, the parties’
23 dispute resolution statements contain detailed references to these documents. (*See* Dkt. Nos. 420,
24 421.) The Court finds that such information, if made public, could inflict competitive harm on

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26 ² Even if the Court did not regard this motion as a proper petition for modification, the Court has
the inherent authority to modify the Decree’s terms. *See Moniz*, 2015 WL 12643792 slip op. at 7.

1 those non-parties, and that good cause exists to maintain the records under seal. The parties'
2 stipulated motion to seal Docket Numbers 420–23 and accompanying attachments is therefore
3 GRANTED.

4 **III. CONCLUSION**

5 For the foregoing reasons, the parties' joint motion requesting dispute resolution (Dkt.
6 No. 419) is GRANTED in favor of Plaintiffs. It is hereby ORDERED:

7 For purposes of completing the Car Cover Study, Defendant shall assess car cover
8 designs for which a functioning prototype is reasonably available to BNSF within six months
9 from the date of this order. Defendant shall forthwith conduct outreach and solicit participation
10 from car cover manufacturers in order to secure a functioning prototype for the car cover study.
11 Defendant shall file a status report every 45 days, until the end of the six-month period, updating
12 the Court on its progress in procuring a functioning car cover prototype. Defendant remains
13 obligated to complete all other requirements of Car Cover Study.

14 The Clerk shall maintain docket numbers 420–423, and the exhibits attached to each,
15 under seal.

16 DATED this 11th day of October 2018.

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20 John C. Coughenour
21 UNITED STATES DISTRICT JUDGE
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